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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re Marriage of SEAN and KAREN  
ROVAI.

H037577  
(Santa Cruz County  
Super. Ct. No. FL017436)

SEAN ROVAI,

Appellant,

v.

KAREN ROVAI,

Respondent.

In this postjudgment family law matter, the family court found that the amount and duration of family support called for by the parties' 2004 marital settlement agreement (MSA) was intended to be nonmodifiable. We disagree with the court's interpretation of the MSA and reverse the judgment.

**I. BACKGROUND**

Sean and Karen Rovai were married in 1992 and separated in 2003. There were three minor children of the marriage. A judgment of dissolution was filed in 2004, stating that child support and spousal support shall be "as set forth in the attached [MSA]." Neither party was represented by counsel in connection with the dissolution proceedings. Sean<sup>1</sup> drafted the MSA, the pertinent portions of which are as follows.

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<sup>1</sup> Consistent with the tradition in marital dissolution cases, we shall refer to the parties by their given names and mean no disrespect in doing so. (*In re Marriage of Alter* (2009) 171 Cal.App.4th 718, 723.)

Under the heading labeled, “Generally,” the MSA recites: “We now intend, by this agreement, to make a final and complete settlement of all of our rights and obligations concerning child custody, child support, spousal support, and division of property.”

The section entitled, “Basis of Agreed Support,” reveals that Sean’s gross monthly income at the time of the agreement was \$20,226 and Karen’s was zero.

Under the “Support of Family” section the document recites, “We are aware that the guideline amount for our case is \$10,093” but agree “that Sean will pay Karen \$8,500 per month as family support. This amount will be reduced to \$5,170.00 effective January 1, 2009, or upon the marriage of Karen. Additionally it is agreed that all support will end May 28, 2018 [when the youngest child turns 18]. Sean also agrees to pay 100% of the children’s school tuition expense through 12th grade.” The MSA further required Sean to maintain a major medical policy of insurance for Karen and the children for the duration of the support obligation.

In an attachment to the judgment, the court notes that “family support shall be paid according to the terms of the [MSA]” and that “each of the parties is ordered to comply with all of the terms and conditions stated therein.”

Sometime after entry of judgment Sean began paying Karen less than the amounts ordered and also stopped paying for medical insurance. According to Karen, Sean made the changes without her agreement, telling her that his attorney told him that he did not owe as much as he had been paying. Karen did not initially seek the court’s assistance to enforce the agreed-upon payments. Beginning in early 2006, Sean reduced his payments to \$7,200 and continued to reduce the payments at intervals thereafter. Karen ultimately sought the aid of the Santa Cruz/San Benito County Department of Child Support Services (DCSS).

On May 27, 2010, DCSS filed a “motion to modify child support” on behalf of Sean, asking the court to set child support “based on the state guideline,” noting that Sean

“requests review” and “[c]laims a decrease in income.” Karen’s response asked the court to “continue with current order: \$5,170.00, as per our dissolution judgment.” Karen urged the court not to modify the order: “I request that the family support order not be modified.” She stated that she had given up her full share of the couple’s corporate business in exchange for the security of the family support order. She also challenged Sean’s claim of reduced income. If the court was to decide that modification was warranted, “I ask that you base the figure on ‘Family Support’ rather than ‘Child Support,’ as was agreed upon.”

The DCSS motion was assigned to department D of the superior court and heard by Commissioner Kast-Davids. At one of the initial hearings in the matter the commissioner acknowledged that the order under review was for unallocated family support and continued the matter to September 28, 2010, to allow Karen “to obtain counsel on the issue of spousal support as the current order is a family support order.”

Karen retained an attorney and on September 15, 2010, Karen filed a motion for declaratory relief and determination of arrearages. With regard to the arrearages, Karen stated in her declaration, “In early 2006 Sean told me that he had decided on his own to reduce my support payments.” Since he had remarried he said he no longer needed her “babysitting services” and “forced” her to give up some of her time with the children. “I was very upset and resistant to both of these demands. Sean was intimidating and emotionally abusive and told me that I had no choice.” The next year, in December 2007, Sean told Karen he would no longer pay for her health insurance. He also continued to reduce his support payments. Karen stated, “I have been very upset and let him know that I was not in agreement with these reductions. He very plainly told me that this is all he was willing to pay and if I wanted more I would have to take him to court.”

On the question of modifiability, Karen acknowledged that child support is always modifiable. She stated that she “does not contend that there is not a child support component in family support, or that that component is not subject to modification and

allocation by the court. But the remaining component is the spousal support component and in the case at bar that consists of the difference between the amount of child support and the specifically agreed-to total family support amount for the specifically agreed-to term.” She sought a judicial declaration “that both the amounts and duration of the ‘family support’ specified [in the MSA] are not modifiable.” Karen also sought attorney fees.

Sean responded with a copy of a written agreement dated December 2, 2006 and signed by both parties, stating that the parties had agreed to reduce family support to \$7,200 per month effective March 2006. His declaration characterized the other reductions in support as made by agreement between him and Karen. He attached e-mails from Karen supposedly showing their negotiations and her agreement to reduced payments. In the first of those e-mails dated July 2009, Karen states that “ever[] since you and Shelby got together all you have done is cut the money--and I have accepted it all with no comment.” In December of 2009 she wrote, “Sean, I need to talk to you about the issue of our child support amount, which I know you are intending to decrease again beginning in January. I have been very stressed about this and what to do, mainly because I have enjoyed our peaceful relationship and I have been reluctant to rock the boat. . . . I have been very accommodating in not making a fuss about the reductions you have made.” Karen’s motion was assigned to department C and was heard by Judge Morse.

The two matters proceeded in parallel. On October 21, 2010, Judge Morse issued a tentative decision finding that the judgment had initially set family support at \$8,500 per month and the parties’ December 2006 agreement validly reduced that to \$7,200 per month effective on the date that agreement was executed. Further, the court found that the parties had intended the amount be reduced again on January 1, 2009, to \$5,170 per month, as provided by the original judgment. The court ordered counsel to meet and confer to calculate arrearages based upon these findings.

Meanwhile, the DCSS motion to modify child support proceeded in department D. In its written statement DCSS set forth the three issues to be decided. The first was, “What are the arrears owed by [Sean] to [Karen]?” As to this issue, DCSS stated that, based upon Judge Morse’s tentative decision, Sean would owe “approximately \$24,250.00 not including interest.” The second issue involved Sean’s obligation to reimburse Karen for health insurance she had purchased when Sean stopped paying for it. Unless the judge found this to be additional spousal or family support, DCSS was not planning to include these amounts in its enforcement efforts. The third issue was “What should be current child support?”

After describing the parties’ financial circumstances, the DCSS memorandum informed the commissioner: “The Department will provide multiple guideline calculations for the settlement conference. However, there still remains the unresolved issue of what spousal support if any should be paid by [Sean]? The Department will not address this issue and will not include spousal support in its calculations to be provided at the settlement conference.” DCSS also attached a letter from Karen’s attorney dated November 2010, which stated: “[Sean] is now seeking to establish the amount of what his current child support obligation should be (arguing without opposition that the child support component of the family support is always modifiable). With respect to that issue only, [Karen] has no objection to setting child support in accordance with Guideline factors. However, the difference between the amount of any established child support and the amount of the agreed family support in the MSA would constitute the spousal support component of that family support; and the combination of the two must still total the same amount as the agreed total amount of family support . . . .”

At the January 18, 2011 hearing in department D, the commissioner met with counsel to estimate the child support amount based upon counsels’ representations of the parties’ income. The commissioner noted that, with regard to child support, the parties were “\$50 off from settling this case” and, if they preferred, they could have an

evidentiary hearing, or they could reach an agreement without a hearing. After a discussion concerning Karen's efforts to find work, an agreement was reached and the commissioner ordered, "\$2950, allocated equally. Effective date?" DCSS responded that the effective date would be May 30, 2010, which was three days after DCSS filed the motion to modify child support. The commissioner issued a written order on April 18, 2011, allocating \$2,950 per month among the three children. The order makes no mention of spousal support.

Following the settlement conference in department D, DCSS filed a memorandum in connection with the proceedings in department C, informing the judge: "On January 18, 2011 the parties came to a stipulation regarding child support effective 5/30/2010. It is \$2950.00 per month. Payment on arrears has been set at \$200.00 per month and effective 5/01/2011 payment on arrears goes to \$350.00 per month." DCSS had prepared an audit based upon the judge's earlier tentative ruling. DCSS asked "that the court issue an order consistent with its indicated ruling. If it does so then [DCSS] requests that the audit as provided [be] confirmed." In closing, DCSS stated, "There still remains the unresolved issue of what spousal support if any should be paid by [Sean]? The Department will not address this issue and will not include spousal support in any calculations until it has been determined by the court."

On March 29, 2011, a further hearing on Karen's motion for declaratory relief and calculation of arrearages was held in department C. According to the minute order (there is no reporter's transcript in the record), Judge Morse found that the commissioner had allocated to child support \$2,950 of the \$5,170 per month payable pursuant to the judgment and, therefore, the remaining \$2,220 was spousal support. The court also found: "The language and intent of the parties, included in the [MSA] makes [sic] it clear that by this agreement, they make a final and complete Settlement Agreement. Hence, non-modifiable." In addition, Sean was to pay Karen \$10,534.70 for her out-of-pocket health insurance expenses, which the court also deemed to be family support.

After a round of briefing and oral argument on a proposed statement of decision, the judge issued a written order and statement of decision on September 21, 2011. In it the judge found that the MSA precluded modification of the amount or duration of the family support called for by the judgment. “The amount of the spousal support component of the ‘family support’ may vary depending upon the amount of the child support component; however, the total amount of both child and spousal support components shall equal \$5,170 per month for so long as family support is payable under the terms of the MSA and judgment. [¶] . . . The spousal support component may not be modified or terminated to the extent that the parties’ written agreement (i.e., the MSA and Judgment) specifically provides that the spousal support is not subject to modification or termination.”

In support of the finding that the MSA precludes modification, the judge stated: “[T]he language of the MSA and of the Attachment to the Judgment, when taken as a whole, makes it clear that the parties intended by the MSA to make a final and complete settlement of all of their marital issues, including the amounts and duration of family support.” Further, “The language of the MSA and of the Attachment to the Judgment, when taken as a whole, is sufficient to express the parties’ specific intent that the ‘Support of Family’ provisions of the MSA be nonmodifiable.”

As to the 2006 agreement that Sean had introduced, the court found it to be a valid modification of the original support order but that its effective date was December 2, 2006, the date it was executed, and not March 2006, as recited in the agreement. The court based the latter finding upon the fact that there was no dispute that arrearages had accrued from March through December, accrued arrearages cannot be modified or forgiven by the court and the parties cannot waive them, and Sean had not received any independent consideration for a waiver of arrearages.

The judge directed the parties to calculate arrearages based upon the findings that total family support should have been \$8,500 per month from January 2004 through

November 2006; \$7,200 per month from December 2006 through December 2008; and \$5,170 from January 2009 through May 28, 2018. In addition, Sean was liable for 100 percent of the children's school tuition expenses through twelfth grade and major medical coverage for each child and for Karen until May 28, 2018. Accordingly, Sean owed Karen for medical insurance premiums she had paid out of her pocket. The issue of attorney fees was reserved. Sean filed a timely notice of appeal from this order.

Karen had filed a separate motion for attorney fees in June 2011, seeking fees pursuant to Family Code sections 2030, 2032, and 3557.<sup>2</sup> Karen's motion showed that as of June 2011 she owed her attorney \$17,945. As to her need for fees, Karen's declaration showed that her house was in foreclosure, income from her rental property and horse boarding business had evaporated, and she had spent down her savings to the point of having to file for bankruptcy. Karen's declaration also pointed out that DCSS calculations from December 2010 showed that Sean was then earning about \$18,000 per month and had assets valued at more than \$3 million.

Sean opposed Karen's motion, arguing that Karen had the funds to pay her attorney, she was responsible for the extent of the litigation, counsel's billing statements were not believable, the fees requested were unreasonable because they were incurred without any consideration of Karen's ability to pay, and the debt had been discharged in bankruptcy so that counsel would be violating federal law by seeking to collect it. Sean did not produce any evidence to contradict Karen's declaration concerning her need for fees, did not submit any current evidence of his resources, and refused to produce documents in response to Karen's discovery request. The family court denied his request for a protective order yet he still refused to produce any financial material. The only evidence Sean produced is an income and expense declaration originally submitted in

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<sup>2</sup> Hereafter all unspecified section references are to the Family Code.

March 2010, about which the court said, “the amounts don’t sound to me like they’re current.”

Karen’s reply to Sean’s opposition explained that \$7,835 of the debt to counsel had been discharged in bankruptcy. The balance due through September 2, 2011, was \$23,041.25.

Karen’s motion for attorney fees was heard on September 7, 2011. The court found that the “initial wrongdoing” was Sean’s failure to pay support. “That was the whole reason that necessitated the court appearance.” The court also found that there was “a disparate amount of wealth on either side.” The court concluded that “under [section] 2030, as well as 2032, and 3652, the Court feels that an order for attorneys’ fees of \$10,000 is reasonable . . . .” The court inquired about Sean’s ability to make monthly payments, to which counsel responded that Sean “cannot offer any testimony about his ability to pay at this point in time. He is asserting his right against self-incrimination under the Fourth, Fifth, and Sixth.” The court concluded, based upon the income and expense declarations in the record that \$1,000 per month “is totally doable for him.” The court’s written order issued October 17, 2011, awards Karen attorney fees of \$10,000 payable at the rate of \$1,000 per month. Sean also appeals from this order.

## **II. DISCUSSION**

### *A. The Effect of the Commissioner’s Child Support Order*

Sean first argues that the family court should not have ruled on the merits of Karen’s motion for declaratory relief because Karen was barred, under principles of estoppel or res judicata, from asserting a claim that the family support order could not be modified. If we correctly understand the argument, Sean maintains that whether or not the parties intended the original family support order to be nonmodifiable the commissioner modified and converted it into a single order for child support, which, according to Sean, effectively extinguished all his other support obligations. Since Karen stipulated to that order, she is estopped from arguing in a second proceeding that the

original order was not to be modified. Sean argues that, if Karen wanted to challenge the commissioner's order, she should have appealed from that order rather than "resort to the creativity of crafting a novel motion for 'Declaratory Relief' to contest [the commissioner's] interpretation of the MSA." We reject the argument.

Stated most briefly, the doctrine of judicial estoppel applies when a party has been successful in asserting one position in a judicial or quasi-judicial administrative proceeding and thereafter takes a completely inconsistent position in a subsequent proceeding. (*Ajaxo Inc. v. E\*Trade Financial Corp.* (2010) 187 Cal.App.4th 1295, 1314.) Res judicata requires, among other things, proof that the claim or issue asserted in the present matter is identical to that asserted previously. (*Whittlesey v. Aiello* (2002) 104 Cal.App.4th 1221, 1226.) Neither doctrine applies here.

Judicial estoppel does not apply because Karen never took an inconsistent position. Karen always maintained that the sum of the child support and spousal support components of family support were to equal the total called for by the MSA. The commissioner's ruling concerned only the child support component. DCSS, the moving party in the proceedings before the commissioner, made that clear in its memorandum, stating that its motion was to determine the amount of child support Sean was legally required to pay and that it took no position on what Sean's other support obligations ought to be. The commissioner recognized that the existing order was for unallocated child and spousal support and made no ruling on the spousal support component. Thus, although the commissioner's order modified the existing unallocated support order by allocating a portion to child support, Karen's stipulation to that change did not conflict with her position because the proceedings before the commissioner concerned only one part of the existing order.

Furthermore, since the proceedings before the commissioner concerned only the child support component of the existing order, there is no basis for Sean's contention that the commissioner's ruling was res judicata with regard to his overall support obligation.

It is true that allocation of a portion of the family support order to child support arguably precludes its characterization as family support. Family support “combines child support and spousal support *without designating the amount to be paid for child support and the amount to be paid for spousal support.*” (§ 92, italics added.)<sup>3</sup> But whether the original support order survived the commissioner’s ruling as “family” support or must be considered as a separate child support order, the record demonstrates unequivocally that the DCSS motion was litigated with the understanding that the commissioner was not deciding Sean’s overall support obligations. In short, there is no support for Sean’s argument that the commissioner’s ruling on child support converted all of Sean’s support obligations to a single child support order or that Karen should be estopped from litigating her nonmodifiability claim.

*B. Modifiability of the Family Support Order*

Karen’s motion for declaratory relief was not a motion to modify or terminate the spousal support component of the existing family support order. Indeed, that is exactly what Karen *did not* want to happen. Rather, her request was for a declaration that, regardless of the amount attributable to child support, the total amount of support called for by MSA was intended to be nonmodifiable.

“Marital settlement agreements incorporated into a dissolution judgment are construed under the statutory rules governing the interpretation of contracts.” (*In re Marriage of Iberti* (1997) 55 Cal.App.4th 1434, 1439.) The interpretation of a written contract is solely a judicial function “unless the interpretation turns upon the credibility of extrinsic evidence.” (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.) The family court in this case did not rely upon extrinsic evidence but based its conclusion

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<sup>3</sup> An unallocated family support order can have useful tax consequences since an unallocated order may be deductible by the support obligor whereas child support payments are not. (See 26 U.S.C. § 71.)

solely upon the writing. Accordingly, we are not bound by the court's construction. We exercise our independent review. (*Ibid.*)

Although the rules of contract interpretation apply to the interpretation of an MSA, the question of modifiability of support agreements is governed initially by the Family Code. The general rule is that “a support order may be modified or terminated at any time as the court determines to be necessary.” (§ 3651, subd. (a).) As to child support, the court “always has the power to modify a child support order, upward or downward, regardless of the parents’ agreement to the contrary.” (*In re Marriage of Alter, supra*, 171 Cal.App.4th at p. 730.) Spousal support is different. The parties may agree to make a spousal support order nonmodifiable. Subdivision (d) of section 3651 provides: “An order for spousal support may not be modified or terminated to the extent that a written agreement, or, if there is no written agreement, an oral agreement entered into in open court between the parties, *specifically provides* that the spousal support is not subject to modification or termination.” (Italics added.)<sup>4</sup> None of the statutes relating to modification or termination of support orders refers to family support. Nevertheless, the parties agree that if the law allows them to set a nonmodifiable amount of family support, their agreement to do so would have to meet the test of section 3651, subdivision (d) and specifically provide as much.

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<sup>4</sup> A parallel provision pertaining to spousal support contains similar language: “An agreement for spousal support may not be modified or revoked to the extent that a written agreement, or, if there is no written agreement, an oral agreement entered into in open court between the parties, specifically provides that the spousal support is not subject to modification or termination.” (§ 3591, subd. (c).) Former Civil Code section 4811, subdivision (b), upon which several of the cases cited below were based, is the predecessor to section 3651, subdivision (d). It, too, required that, in order to avoid the general rule of modifiability, a spousal support agreement must “specifically” provide to the contrary. (Former Civ. Code, § 4811, subd. (b), Stats. 1983, ch. 1304, § 8; see Cal. Law Rev. Comm. com. fol. § 3651.)

The MSA before us does not specifically state that the amount of family support was to be nonmodifiable. Indeed, the document does not use any form of the word “modify.” The closest it comes is the recitation in standard contract language that the agreement was a final and complete settlement of the parties’ custody, support, and property disputes. Courts have interpreted the “specifically provides” language of the statutes as requiring much more explicit language than that. For example, *Fukuzaki v. Superior Court* (1981) 120 Cal.App.3d 454, 458, held: “The provisions for a ‘final and complete’ settlement coupled with a release of all obligations and a provision that the agreement is entire and binding on the parties and their heirs do not equate with the requirement of a ‘specific’ provision for nonmodification such as ‘nonmodifiable’ [citation], or ‘irrevocable’ [citation]. Although no particular magic words are needed to provide the exception to nonmodifiability contemplated by [former Civil Code] section 4811, subdivision (b), some specific unequivocal language directly on the question of modification is required.” In a similar vein, *In re Marriage of Jones* (1990) 222 Cal.App.3d 505, 510 concluded that “a stated and periodically reducing amount of support” was not “a specific provision against court modification.” Another court held that a general “release of rights” does not disclose an intent against judicial modification in the face of changed circumstances. (*In re Marriage of Nielsen* (1980) 100 Cal.App.3d 874, 878.)

Karen cites *In re Marriage of Smiley* (1975) 53 Cal.App.3d 228, in support of her argument that the trial court was correct in interpreting the MSA as a whole. In *Smiley*, the alimony clause in the parties’ agreement stated that the husband was to pay wife a sum certain for a period of time, stepped down to “ ‘\$600.00 per month until the death or marriage of Wife.’ ” (*Id.* at p. 230.) Karen points out that the *Smiley* court found the agreement was nonmodifiable even though the clause following the support provision stated that support was “ ‘subject to any order, Decree or Judgment of any Court based thereon.’ ” (*Ibid.*) But the provision that persuaded the *Smiley* court that spousal support

was not to be modified was a separate clause that specified: “ ‘[T]his agreement is entire, indivisible, and shall constitute an integrated agreement, which is not subject to modification.’ ” (*Id.* at p. 231.) The instant agreement contains nothing similar.

*In re Marriage of Forcum* (1983) 145 Cal.App.3d 599, 604, which rejected a nonmodifiability claim, observed: “A dispute on the issue of nonmodifiability of spousal support would not arise if the provision for spousal support within the marital settlement agreement stated ‘spousal support is nonmodifiable.’ . . . Careful draftsmen preparing marital settlement agreements providing for spousal support should specifically state that spousal support is nonmodifiable, if that is the agreement of the parties.” The instant agreement is entirely silent on the question of modifiability. Even taken as a whole, the MSA does not reveal an intent to prevent judicial modification of the total amount of the support order. The “final and complete” language is boilerplate, referring to all custody, support, and property terms as a final settlement. The attachment adds nothing other than an order directing the parties to comply with the terms of the MSA.

Karen points to the fact that the MSA reserves jurisdiction in the court to “carry out” the agreement and does not reserve jurisdiction to modify the support order. The omission is meaningless in the present context. Section 3651 provides for ongoing jurisdiction of all existing support orders absent an agreement “specifically” providing that spousal support is not modifiable. “The import of the statute may not be ‘avoided by drawing inferences as to the intention of the parties’ from general provisions of the agreement which do not contain a specific provision concerning judicial modification.” (*Fukuzaki v. Superior Court, supra*, 120 Cal.App.3d at p. 458, quoting, *In re Marriage of Nielsen, supra*, 100 Cal.App.3d at p. 878.)

We conclude that the MSA cannot be read as providing for a nonmodifiable total amount of family support. Accordingly, the family court’s judicial declaration to the contrary must be reversed. Because the matter before the family court judge did not involve a motion to modify or terminate spousal support, our holding does not affect the

court's ruling on the amount of Sean's existing support obligations. With exceptions not pertinent here, "a support order may not be modified or terminated as to an amount that accrued before the date of the filing of the notice of motion or order to show cause to modify or terminate" the support order. (§ 3651, subd. (c)(1).) And such a motion may only be granted if there has been a material change of circumstances since the last order. (*In re Marriage of Khera & Sameer* (2012) 206 Cal.App.4th 1467, 1479.) Here, there was no motion to modify or terminate the spousal support component of the order and no attempt by either party to show a change of circumstances warranting modification. This was simply a declaratory relief action and our reversal affects only the declaration of nonmodifiability.

*C. Effective Date of the December 2006 Agreement*

The general rule is that an order for child support continues in effect until terminated *by the court* or by operation of law. (§ 3601, subd. (a).) Section 3651, subdivision (c)(1) provides, with exceptions not pertinent here, that "a support order may not be modified or terminated as to an amount that accrued before the date of the filing of the notice of motion or order to show cause to modify or terminate." The section applies whether or not the order is based upon an agreement between the parties. (§ 3651, subd. (e).) Thus, the court may modify or terminate a support order prospectively only; it may not modify or forgive accrued support arrearages. (*In re Marriage of Sabine & Toshio M.* (2007) 153 Cal.App.4th 1203, 1213 (*Sabine & Toshio*).) That said, some courts have applied the defenses of accord and satisfaction, waiver, and estoppel to extrajudicial parental agreements. (*Id.* at p. 1215 [accord and satisfaction]; *In re Marriage of Vroenen* (2001) 94 Cal.App.4th 1176, 1182 [no estoppel under facts of case]; *In re Marriage of Ayo* (1987) 190 Cal.App.3d 442, 452 [waiver or estoppel would be a concern in subsequent action where payee spouse failed to seek arrearages in first court action].)

In this case, the court found that the December 2006 agreement between Sean and Karen was a valid modification of the existing court order; that conclusion is not

challenged here. Sean argues only that the trial court erred in concluding that the modification was effective in December 2006, when the written agreement was executed. He maintains that the modification was effective as of the date recited in the agreement (March 2006).

We review the family court's interpretation of the language of the agreement under the independent standard of review. (*Parsons v. Bristol Development Co., supra*, 62 Cal.2d at p. 865.) To the extent the court's decision was based upon the resolution of conflicting extrinsic evidence, we uphold any reasonable construction if it is supported by substantial evidence. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.)

The plain language of the December 2006 agreement makes modification of the court-ordered family support retroactive to March of that year. Retroactive reduction of a support order effectively forgives arrearages that have already accrued. Under section 3651, subdivisions (c) and (e), the court could not forgive arrearages already accrued even if the parties had agreed otherwise. It is true that a court might enforce such an agreement under the doctrine of accord and satisfaction where there is a dispute concerning whether or how much an obligor is in arrears. For example, "where a husband asserted that he owed \$250 a month in spousal support, and the wife contended that \$300 was the correct amount, they could resolve their differences in a manner that was binding on the court. [Citation.] [¶] But an accord and satisfaction requires the existence of a bona fide dispute concerning the debt." (*Sabine & Toshio, supra*, 153 Cal.App.4th at p. 1215.) Here, as the family court correctly stated, there was no dispute about how much was due. The judgment states that Sean was to pay \$8,500 per month and there is no dispute over how much he actually paid. Thus, the equitable doctrine does not apply. Since the court is precluded by law from making a retroactive modification of accrued arrearages, the court did not err in rejecting Sean's claim that the parties' written modification agreement should be effective retroactively.

Sean argues the parties' "performance" shows that the parties' agreement was actually made in March 2006 and merely memorialized in December. Sean's argument raises a factual issue that the family court implicitly decided against him. The substantial evidence to support the court's finding is contained in Karen's declaration, in which she states that Sean "decided on his own" to reduce the payments, that she "was very upset and resistant" and that he "was intimidating and emotionally abusive and told me that I had no choice." The evidence supports the conclusion that there was no meeting of the minds prior to December 2006 and that, therefore, Sean's reduced payments prior to that time could not have been "performance" of an existing oral agreement.

#### *D. Attorney Fees*

The trial court found that Karen was entitled to attorney fees pursuant to section 2030. Section 2030 and the related section 2032<sup>5</sup> empower the family court "to award fees and costs between the parties based on their relative circumstances in order to ensure

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<sup>5</sup> Section 2030, subdivision (a)(1) provides: "In a proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties, and in any proceeding subsequent to entry of a related judgment, the court shall ensure that each party has access to legal representation, including access early in the proceedings, to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party, except a governmental entity, to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding." Section 2032, subdivision (b) reads, as follows: "In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320. The fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances."

parity of legal representation in the action. . . . In assessing a party's relative need and the other party's ability to pay, it is to take into account ' " 'all evidence concerning the parties' current incomes, assets, and abilities.' " ' (*In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 406.) That a party who is requesting fees and costs has the resources is not, by itself, a bar to an award of part or all of such party's fees. Financial resources are only one factor to consider. (*Ibid.*) The trial court may also consider the other party's trial tactics. (*In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1314; *In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1157 [trial court may consider trial tactics (normally a matter for sanctions) in a Fam. Code, § 2030 award].)" (*In re Marriage of Falcone and Fyke* (2012) 203 Cal.App.4th 964, 974-975, fn. omitted.) "California's public policy in favor of expeditious and final resolution of marital dissolution actions is best accomplished by providing at the outset of litigation, consistent with the financial circumstances of the parties, parity between spouses in their ability to obtain effective legal representation. ' " "A motion for attorney fees and costs in a dissolution action is addressed to the sound discretion of the family court." ' (*In re Marriage of Keech* (1999) 75 Cal.App.4th 860, 866.)" (*In re Marriage of Tharp, supra*, at p. 1312.)

Sean argues that sections 2030 and 2032 do not support the court's award because they provide for pendente lite attorney fees, namely, fees awarded during the course of the litigation. According to Sean, since the award came after the conclusion of all litigation (other than contempt proceedings that were then pending against him), the fee award could not be for pendente lite fees. And, since Karen did not produce a litigation plan detailing her future litigation plans, she was not entitled to attorney fees under section 2030. We reject the argument.

Karen included a request for attorney fees in her first moving papers. That is, she sought, at the outset, an award of fees to help her pay for the attorney who filed the papers on her behalf. This is exactly the purpose for which section 2030 is designed.

Sean's argument is, in effect, that section 2030 does not permit need-based attorney fees to be awarded retrospectively. He provides no authority to support the argument. While Karen might have requested fees as a pro per litigant in order to allow her to obtain legal counsel, there is nothing in the law that precludes her obtaining counsel first and then seeking fees under section 2030 to help pay for the representation. Indeed, *In re Marriage of Tharp, supra*, 188 Cal.App.4th at page 1314, implicitly approved the award of attorney fees under section 2030 for services already rendered when it held that the trial court had abused its discretion in failing to review attorney billing records (i.e., records of services already rendered) before denying a section 2030 fee request.

Sean cites *Kevin Q. v. Lauren W.* (2011) 195 Cal.App.4th 633, 641 (*Kevin Q.*), for the proposition that Karen was required to submit a litigation plan for future litigation in order to be entitled to fees under section 2030. But *Kevin Q.*, which held that a court may look to section 2032 for guidance in deciding the reasonableness of an attorney fees award under the Uniform Parentage Act, contains no such rule. (See *Kevin Q., supra*, at pp. 642-644.)

Sean maintains that the award of attorney fees was improper because Karen's obligation was discharged in bankruptcy. Yet the record shows that only part of the debt was discharged. Roughly \$15,000 in fees had accrued subsequent to the bankruptcy. The trial court's award was only two-thirds of that total.

Sean also argues that there is "no information in the record to support the order for attorney fees other than the trial court's perceived difference [*sic*] in the parties' wealth which is not supported by the record." This misrepresents the record. Karen's declaration stated that she had lost her home and her job and had filed for bankruptcy and that Sean had been enjoying a healthy monthly income of around \$18,000. Although Sean argued that the parties' relative means was not as Karen represented, he produced

no evidence to support the argument.<sup>6</sup> Accordingly, Sean has failed to show that the court abused its discretion in making an award of fees under sections 2030 and 2032.

Sean also argues that section 3652, which provides that “an order modifying, terminating, or setting aside a support order may include an award of attorney’s fees and court costs to the prevailing party” does not apply because the court’s order did none of those things. We agree that the section is inapplicable. Although the family court’s attorney fees order is supported by sections 2030 and 2032, the court also cited section 3652 in deciding to award attorney fees in this case. We shall direct the court to reconsider the question of attorney fees under sections 2030 and 2032 only.

Karen requests that we impose sanctions pursuant to California Rules of Court, rule 8.276 against Sean. We deny that request.

### **III. DISPOSITION**

The order of the family court dated September 21, 2011, is reversed. The matter is remanded to the family court with directions to vacate its declaration that the family support set forth in the parties’ marital settlement agreement is nonmodifiable and to enter a new order declaring that support may be modified as allowed by law. Because the instant matter did not involve a motion to modify or terminate a support order, our holding does not affect the family court’s ruling on the amount of Sean’s existing support obligations.

The order of the family court dated October 17, 2011, awarding attorney fees to respondent Karen Rovai is reversed. The trial court is directed to reconsider the award under Family Code sections 2030 and 2032.

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<sup>6</sup> Sean suggests that he could not have produced the evidence without incriminating himself. He states in his opening brief that Karen had given him “the Hobson’s Choice of giving up his right to self incrimination on the contempt allegation, or defend the request for attorney fees by producing information on his financial condition.” Sean’s dilemma is no substitute for evidence.

The parties shall bear their own costs on appeal.

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Premo, Acting P.J.

WE CONCUR:

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Mihara, J.

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Márquez, J.